

An Overview of President Biden's Appointments

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Abstract: *Una panoramica sulle nomine del Presidente Biden* – The paper examines some of the most important features of President Biden's appointments, with reference to the highest ranks of the executive branch, ambassadors, and the federal judiciary. President Biden's policy of appointments reestablished traditional criteria after Trump's exceptionalism. However, The President's policy most relevant impact is related to the development of diversity, so as to represent all the parts of American society.

Keywords: U.S. President; Appointments; Executive Branch; Ambassadors; Federal Judiciary.

1. Introduction

According to Article II, Section 2, Clause 2, of the Constitution (the so-called Appointments Clause), the President of the United States is empowered to appoint a wide range of public officials. Depending on the level of the officials, the appointment process requires either the "advice and consent" of the Senate or, simply, an individual decision by the President himself/herself. Among the officials whom the President is entitled to appoint, the most significant positions within the Executive and the Judiciary are established either by the Constitution or by legislation.¹

Due to its scope, the power of appointment is one of the most significant powers to define a President, not only in relation to the immediate impact of his or her policies but also with regard to his or her capacity to influence the public apparatus for decades following the end of his or her mandate. This applies especially to the judicial branch, as Article III, Section 1, of the Constitution protects judges from removal, granting them the power to "hold their offices during good behavior." Therefore, judges appointed by a president can (and generally do) remain in office even for many years, throughout the terms of subsequent presidents.

Of course, the great power allocated to the President in theory may

¹ Article II, Section 2, Clause 2, of the Constitution reads as follows: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

have different practical outcomes, depending on the circumstances and the context in which it is exercised and on how the President decides to act.²

Concerning President Biden's tenure, it is fair to state that the political context surrounding the appointments afforded him, at least in theory, a certain support for his nominees. Indeed, with the 2020 elections, Democrats achieved equality of seats in the Senate and, according to Article I, Section 3, Clause 4, of the U.S. Constitution, the Vice President, acting as president of the Senate, has the power to cast a vote in case of equality, so as to break the tie.³ Thanks to this provision, the Senate could work almost as if Democrats had a (very narrow...) majority. Moreover, as a general rule, no compromise with Republicans seemed to be needed, since the 2020 House of Representatives elections confirmed the Democrats' majority, with 222 seats against Republicans' 213. After the 2022 midterm elections, the political context was also quite favorable, since the Democrats' majority in the Senate was confirmed and even a little strengthened, with a 51/49 split, although at the same time Democrats lost their majority in the House of Representatives, and thus they had to cope with Republicans trying to find compromises on the most relevant issues. And, from time to time, confirmations could become relevant issues.

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It would be impossible to track all the nominations and the appointments that have characterized President Biden's tenure. Therefore, in the following paragraphs I will examine some of the most relevant features of Biden's policies in this respect, concerning different sectors of the federal government to which appointments are made.

Unless otherwise specified, data and pieces of information are updated to October 1, 2024.

² As far as the power of appointment and the practice of the last Presidents are concerned, I will refer to previous papers that I had the opportunity to write: see "*Change We Can Believe In.*" *The Case of President Obama's Appointments*, G.F. Ferrari (ed.), *The American Presidency After Barack Obama*, The Hague, 2018, 81 ff.; *President Trump's Appointments in Four Keywords*, G.F. Ferrari (ed.), *The American Presidency under Trump: The First Two Years*, The Hague, 2020, 49 ff.; *President Trump's Appointments: A Policy of Activism*, in *DPCE online*, 1/2021, 927 ff.; *Back to Normalcy, Straight to Diversity: A Provisional Overview of President Biden's Appointments*, in *DPCE online*, special no., 2023, 17 ff.

³ Article I, Section 3, Clause 4, of the Constitution reads as follows: "The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided." In the first two years of President Biden's term, Vice President Harris had frequently recourse to tie-breaking votes, and most of the times (twenty out of twenty-six) the vote was related to an appointment process; in the second part of Biden's Presidency, all the seven cases of tie-breaking votes concerned an appointment process: see *United States Senate – Votes to Break Ties in the Senate*, <https://www.senate.gov/legislative/TieVotes.htm> (last accessed October 1, 2024). Thanks to the composition of the Senate, and the equality or the narrow difference in seats between Democrats and Republicans, Kamala Harris' term made her the first President of the Senate by number of tie-breaking votes. In order to find almost equivalent numbers of tie-breaking votes, one must go back to Vice Presidents John C. Calhoun (1825-1832, 31 votes) and John Adams (1789-1797, 29 votes): see <https://www.senate.gov/about/resources/pdf/occassion-when-vice-president-broke-senate-tie-votes-1789-1980.pdf>.

2. A Renewed Stability in the Highest Ranks of the Executive Branch

One of the most relevant features of the executive branch during President Biden's tenure was the low turnover rate of the individuals covering the roles of advisers and secretaries to the president.

This kind of turnover became the focus of particular attention during President Trump's term. The reason for this interest was its very high rate. The Governance Studies program at the Brookings Institution started to follow its evolution⁴ and periodically delivered updates and reports, the last of which was published in January 2021.⁵ For President Biden's administration, the same activity has been carried out, starting from January 2022, with periodical updates (the most recent was published in March 2024).⁶ The data on turnover referred to in this presentation are drawn mainly from this report.

A first set of data focuses on the most important members of the Executive Office of the President,⁷ identified on the basis of the "Decision Makers" editions of the National Journal.⁸

There are estimated to be 66 "decision-makers" in Biden's administration, slightly more than the average number in previous presidencies since 1981. In fact, the average number of decision-makers in the six previous presidencies was 61.3; it was only during the Clinton years that the number (70) exceeded that of Biden's administration today. Three other presidencies were close to Biden's total: Reagan's administration had 60 such positions, G.W. Bush had 63, and Trump had 65. A significant gap exists only in comparison with the 57 positions in place during G.H.W. Bush's Presidency and, in particular, in comparison with the 53 positions during Obama's tenure.

The crucial factor, however, is the turnover rate. During the first three years of President Biden's term, 43 positions (47 counting the first months of the fourth year) went through turnover; therefore 65.2% of the positions were concerned, for the first three years, and 71.2%, counting

⁴ See K. Dunn Tenpas, *Why is Trump's staff turnover higher than the 5 most recent presidents?*, *The Brookings Institution*, January 19, 2018, www.brookings.edu/research/why-is-trumps-staff-turnover-higher-than-the-5-most-recent-presidents/.

⁵ See K. Dunn Tenpas, *Tracking turnover in the Trump administration*, *The Brookings Institution*, January 2021, www.brookings.edu/research/tracking-turnover-in-the-trump-administration/.

⁶ See K. Dunn Tenpas, *Tracking turnover in the Biden administration*, *The Brookings Institution*, January 20, 2022 – Updated March 19, 2024, www.brookings.edu/research/tracking-turnover-in-the-biden-administration/.

⁷ The Executive Office of the President, overseen by the White House Chief of Staff, has had a key role since its establishment in 1939. In fact, many of the President's closest advisers are part of this Office. Senate confirmation is required only for some advisers, whereas most of them are appointed by the President at his own discretion.

⁸ From 1981 to 2009, the National Journal published these figures during each president's first year. The criteria that were used to select the most influential advisers are explained in *How the 250 Decision Makers Were Selected*, July 16, 2013, *National Journal*, <https://www.nationaljournal.com/s/75992/how-250-decision-makers-were-selected>.

turnover up to March 2024.

These data show a clear difference between Biden's and Trump's policies. Actually, during President Trump's term, 59 positions out of 65 went through turnover (54 during the three first years), with a considerable rate of 90.8% (83.1% considering only the three first years).

During the previous presidencies, the threshold of 80% was not crossed and only under the first term of Presidents Reagan, Clinton, and Obama the rate exceeded 70% (78%, 74%, and 71% respectively), whereas during G.H.W. Bush's Presidency and the first term of G.W. Bush's mandate, the rate was between 60% and 70% (66% and 63%; respectively).

In light of this comparison, it is fair to state that President Biden has returned to the ordinary practices, after the substantial exceptionalism of President Trump's policy of turnover.

This assumption is strongly confirmed if one takes into account the rate of turnover in the Cabinet. During Biden's term, only two positions underwent turnover: this is the lowest number for the first term presidencies since Reagan's. Only G.W. Bush equals this record low, whereas Clinton and Obama, with four and three changes made, are not so far. On the contrary, the other Presidents had more frequent recourse to turnover: G.H.W. Bush made eight changes and President Reagan's first term was characterized by six changes. President Trump's data can hardly be compared, since the overall number of cabinet changes is fourteen, namely nearly double of the previous record-high (G.H.W. Bush's) and exactly seven times the record-lows (G.W. Bush's and Biden's).

President Biden succeeded in recreating a stable cabinet, after the tumultuous years of Trump's Presidency. It is a patent expression of stability, indeed, the fact that the first change in cabinet composition occurred only during the third year of the term, in March 2023, when the Secretary of Labor, Marty Walsh, resigned (to become head of the National Hockey League Players' Association), followed, roughly one year later, by the Secretary of Housing and Urban Development, Marcia Fudge, who resigned too. It is noteworthy that in both cases there has been no formal appointment of a successor: Julie Su was nominated Secretary of Labor in March 2023 and was renominated in January 2024, but the Senate has not confirmed her so far; with regard to the Secretary of Housing and Urban Development, Adrienne Todman, Fudge's Deputy, assumed acting office since March 2024 without even being nominated so far.

3. The Declining Weight of Politics in Ambassadorial Appointments

The ambassadors of the United States are nominated by the President, and their appointment must be confirmed by the Senate.

President Biden nominated a high number of ambassadors. The updated list as of August 2, 2024, includes 217 appointments.⁹

⁹ The full list is available on the website of the American Foreign Service Association: <https://afsa.org/appointments-joseph-r-biden>.

Even without considering the further appointments that will presumably occur during the last months of his tenure, President Biden's pace of appointments (54.25 per year) is roughly equal to that of most of his predecessors, and – in general – it is even a little higher: President Obama appointed 416 ambassadors in eight years (52 per year),¹⁰ President Clinton appointed 417 (52.125 per year),¹¹ President G.H.W. Bush made 214 appointments in four years (53.5 per year),¹² President Reagan appointed 420 (52.5 per year),¹³ and President Carter appointed 202 in four years (51 per year).¹⁴ A higher rate characterized the practice by President G.W. Bush, who made 460 appointments in eight years (57.5).¹⁵ On the contrary, President Trump, with 191 appointments in four years (47.75),¹⁶ established the record-low.

Notwithstanding the interest aroused by the number of appointments itself, another element deserves at least the same attention. It deals with the choices made concerning the appointees. The main alternative is the one between career appointments and political appointments, even though appointments concern, sometimes, civil servants and retired or recalled foreign service officials.

The choice between appointing a career diplomat or an outsider falls within the President's margin of discretion. In any case, the tradition established at least in the last decades grants diplomats a vast majority of appointments. More precisely, Presidents expressed by the Democrats appeared to be slightly more willing to value career experience than Republicans: if the general trend was to reserve no more than one-third of appointments to political choices, the most "diplomat-oriented" president was Carter, since only 26.24% of his ambassadorial appointments were selected on a political basis; President Clinton's rate was 28.06%, President Obama's 30.05%; among the Republicans, President G.H.W. Bush's rate was 31.3%, and President G.W. Bush's 31.8%. Only President Reagan gave a greater consideration to political choices, which constituted 37.6% of his total appointments. Against this backdrop, President Trump confirmed the rule and went even further, establishing a record-high rate of political appointments, with 43.5%.

Compared with his predecessor, President Biden has renewed the tradition that limited appointments outside the diplomatic career. Indeed, 139 (64.1%) were career appointments, whereas political appointments were 67 (30.9%); 8 appointees (3.7%) came from the Foreign Service and 3 (1.4%) from the Civil Service. Thanks to this approach, President Biden seems to have contained the possible impact of the policy of his predecessor that, if it had been confirmed, could be considered not enough rewarding for the skills and experience acquired carrying out the diplomatic career.

¹⁰ See <http://www.afsa.org/appointments-barack-obama>.

¹¹ See <http://www.afsa.org/appointments-william-j-clinton>.

¹² See <http://www.afsa.org/appointments-george-h-w-bush>.

¹³ See <http://www.afsa.org/appointments-ronald-reagan>.

¹⁴ See <http://www.afsa.org/appointments-jimmy-carter>.

¹⁵ See <http://www.afsa.org/appointments-george-w-bush>.

¹⁶ See <https://afsa.org/appointments-donald-j-trump>.

4. The Special Care in Judicial Appointments

When President Biden took office, the Judicial Branch had undergone considerable changes in composition, due to the impact of President Trump's appointments, especially at the highest level of Article III Courts: indeed, with 3 appointees President Trump determined one-third of the Federal Supreme Court, while his 54 appointees constituted 30.17% of all the Federal Courts of Appeals judges.

Notwithstanding the impact of his predecessor, even the raw number of appointments made by President Biden can explain his relevance for the present and the next future of the Federal Judiciary.

The pace of presidential appointments is, of course, of the utmost importance. Nevertheless, irrespective of the exact number of judges that President Biden will be able to appoint during his whole tenure, several other features already deserve particular attention, since they show the huge difference with his predecessor's policy of appointments. In this regard, it is fair to state that during his term President Biden succeeded in rebalancing, as much as he could, the composition of the Federal Judiciary. However, his policy has been characterized, in particular, for the careful choice of appointees, both in terms of professional qualifications and diversity.

4.1 A Considerable Pace

As of October 1, 2024, during his fourth year in office, President Biden appointed 213 Article III Courts judges: in the unlikely event that no further appointments occurred, the average number of 53.25 appointments per year would already be one of the highest in the last decades.

At the end of his tenure, President Trump had a record of 234 appointments (namely 58.5 per year), a record that President Biden could in principle match or even surpass during the last weeks of this tenure. As a result, taking into account the last eight Presidents, only one made better: in his four-year mandate, President Carter appointed 262 federal judges (65.5 per year) and President Reagan 402 in eight years (50.25 per year); their successors all remained below the threshold of 50 appointments per year: President G.H.W. Bush, with 197 appointments in four years, scored 49.25; President Clinton appointed 387 judges in eight years, thus 48.38 per year; the 340 appointments made by President G.W. Bush resulted in 42.5 per year; and President Obama, with 334 appointments, scored the record low of 41.75 appointments per year.

The total numbers are important, but even more important are the courts to which appointments are made. Against this backdrop, appointments to the Supreme Court are, of course, the most relevant, and in this respect, President Biden, with his only appointment has, a worse score than all the other presidents after Jimmy Carter, who did not appoint any justice: on the contrary, President Trump, in only four years, had the opportunity to appoint three justices, the record-high, equal to the number of justices that President Reagan did in eight years; all the others – namely Presidents Obama, G.W. Bush, Clinton (in eight years), and President G.H.W. Bush (in four years) – appointed two justices.

If the choice of new justices of the Supreme Court particularly captures the attention of observers, the impact on case-law of appointments to U.S. Courts of Appeals is far from negligible, especially taking into account the firm case selection policy carried out by the Supreme Court. In this regard, President Biden has appointed, so far, 44 Court of Appeals judges. His record is lower than his predecessor's, since President Trump appointed 54 Circuit judges. Two other Presidents made it better: the most active was President Carter with 56 appointments made in his four-year mandate, while President Reagan appointed 101 circuit judges in eight years (50.5 per term). G.H.W. Bush's four-year presidency was characterized by 44 appointments, equal to President Biden, who still has the opportunity to surpass this threshold. The last eight-year presidencies had a lower rate than President Biden's in his term: President Clinton appointed 73 circuit judges (36.5 per term), President G.W. Bush 72 (36 per term), and President Obama only 58 (29 per term).

It is however at the U.S. District Courts level that President Biden has had the best results, with 166 appointees. In the last five decades, only President Carter made significantly better, with 206 appointments, while President Trump, with 174 appointments, could be surpassed in the last weeks of President Biden's tenure. All the other Presidents scored a lower number of appointments if one considers the number of terms: President Clinton appointed 307 District judges, therefore an average number of 153.5 per term, President G.H.W. Bush made 150 appointments in one term, President Reagan appointed 292 judges (146 per term), President Obama 270 judges (135 per term), and President G.W. Bush 264 (132 per term).

All these data, in their entirety, can justify the opinion according to which President Biden's record is far from being unsatisfying. The number of vacancies confirms this view. In January 2021, there were 2 vacancies in the U.S. Courts of Appeals, 43 vacancies in the U.S. District Courts, and 1 in the U.S. Court of International Trade.¹⁷ Three years and nine months later, vacancies were reduced to 1 in the U.S. Courts of Appeal and 40 in the U.S. District Courts.

Taking into account also the future vacancies (i.e., current judges that have announced their future retirement or going senior date), the numbers of nominations or appointments required rises to 6 Circuit judges and 58 District judges. However, the overall number of 64 vacancies could be nearly matched considering that there are 28 pending nominees in the Senate, 3 who are waiting for Senate Judiciary Hearing, 8 who are waiting to be reported out of the Senate Judiciary Committee, and finally, 17 waiting for vote by Full Senate. This means that if all these nominations were confirmed, 56 new appointments could be made, leaving only 8 present or future vacancies.¹⁸

¹⁷ See the Archive of Judicial Vacancy page of the U.S. Courts website. See, in particular, the *Vacancy Summary for January 2021*, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2021/01/summary>.

¹⁸ These data are available at the American Constitution Society website, Judicial Nomination page: <https://www.acslaw.org/judicial-nominations>.

4.2 A (Partially) Rebalanced Judiciary

The number of appointments made does not significantly distinguish President Biden's from President Trump's policies of appointments to the Federal Judiciary. Actually, the most obvious difference between President Biden and President Trump deals with political orientation. Even though it is impossible to establish, for most of the cases, whether the appointer and the appointee share precisely the same orientation, it is fair to state that President Biden has likely chosen judges with a history, a culture and a sensitivity compatible with his, and it goes the same for President Trump, as well as for all other previous Presidents. As a result, it is important to have a balanced representation even in the Judiciary, so as to answer more efficiently to the different social demands.

Looking at the three levels of the Federal Judiciary,¹⁹ President Biden's appointments to U.S. Districts Courts gave the Democrats a clear majority. At the end of President Trump's tenure, Republican Presidents and Democrat Presidents had appointed roughly the same number of judges: 318 the firsts and 317 the seconds; as of September 27, 2024, the share of judges appointed by Democrats has considerably grown, with a total of 370 against 267 judges appointed by Republicans. This means that approximately 58.1% of the active District judges are now expressed by Democrats, with President Obama still having the highest share (190 judges), followed by President Trump's appointees (170), and President Biden's (161).

With regard to the U.S. Courts of Appeals, President Biden's appointments could not reverse the majority, even though they succeeded in achieving a partisan equality.

At the beginning of President Biden's tenure, thanks to the remarkable score of 53 appointments made by President Trump, Republicans had a clear majority of 54.2% of the active judges: 96 judges against 81. President Biden, with 43 active judges as of September 16, 2024, made certainly a good score, but the dramatic reduction of the number of judges appointed by President Clinton (31 in 2021, 10 in September 2024) and, in part, of those appointed by President Obama (50 in 2021 and 36 nearly four years later) weakened the impact of Biden's activism, so that today Republicans and Democrats have both 89 judges.

As a result, the most unbalanced court remains the Supreme Court, in which the 6 to 3 majority of Republican appointees at the end of President Trump's term was not scratched by the only appointment made by President Biden, with Justice Ketanji Brown Jackson taking the seat of former Justice Stephen Gerald Breyer, who was appointed by President Clinton. The unbalanced composition of the Court and the impossibility to deploy remedies to limit its Republican majority was aggravated by the Court's case-law, and especially by the most conservative oriented judgments, such as, for instance, the one overruling the *Roe v. Wade* case

¹⁹ The data that follow in the text are based on those that are provided by Wikipedia, 'Judicial appointment history for United States federal courts', https://en.wikipedia.org/wiki/Judicial_appointment_history_for_United_States_federal_courts.

concerning abortion²⁰ or even the one related to the interpretation of the Second Amendment and the right to bear arms.²¹

Given the present situation, it is hard to imagine a shift in the majority and a significant change in case-law. Indeed, most of the justices are relatively young and are supposed to be active still for a long time. The senior members were both appointed by a Republican President, but they are 76 and 74 years old (respectively, Clarence Thomas and Samuel A. Alito Jr.), therefore it is nearly a certainty that during President Biden's term no changes in the Supreme Court's composition will occur, but it is more than likely that it will go the same for the next presidential term. Against this backdrop, barely hiding a possible feeling of frustration, President Biden, after having imagined a reedition of the "Court-Packing Plan" in 2022, has recently planned initiatives to make the Congress approve term limits at 75 years old: "Term limits would help ensure that the Court's membership changes with some regularity; make timing for Court nominations more predictable and less arbitrary; and reduce the chance that any single Presidency imposes undue influence for generations to come."²² While proposing this reform of reduced impact, President Biden also expressed his support for a stronger intervention, establishing "a system in which the President would appoint a Justice every two years to spend eighteen years in active service on the Supreme Court."²³

Neither the first nor the second reform has a chance to be adopted, due *inter alia* to the Republican majority in the House of Representatives. The real interest of President Biden's proposition lies in the simple fact that a President at the end of his tenure highlights the opportunity to introduce major changes in appointments of the members of the Supreme Court: this seems to be quite revealing of the absolute randomness of the impact of the exercise of this power by a President.

4.3 The Importance of Professional Qualifications

The American way of choosing the members of the Federal Judiciary is based on the implicit condition that the President's selection, together with the filter of the Senate's advice and consent, is capable of granting adequate professional qualifications of the appointed judges.

Since the whole process is rooted in the political sphere, it is of the utmost importance to preserve a high standard of judges, whose qualification, on the one hand, can prevail their initial political selection and, on the other, can be the foundation of the expected independence of judges even *vis-à-vis* his or her appointer. For these reasons, a very significant index of the policy of appointments in the judiciary is provided

²⁰ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

²¹ *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022).

²² See The White House, *Fact Sheet: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, July 29, 2024, <https://www.whitehouse.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law/>.

²³ *Id.*

by the American Bar Association, that rates on professional grounds any nominated judge before his or her confirmation.²⁴

The analysis of the records concerning the rating of President Trump and President Biden's nominees, and their comparison demonstrate that their approaches were considerably different.

Starting with the 327 Trump's nominees that underwent evaluation, only a simple majority of them, 158 (48.3%) were unanimously declared 'Well Qualified'.²⁵ For 93 others (28.4%) some members of the board opted for 'Well Qualified' and others for 'Qualified'.²⁶ 44 nominees (13.5%) were unanimously declared (simply) 'Qualified', whereas for 27 (8.3%) the members of the board were divided between 'Qualified' and 'Not Qualified'. In 1 case (0.3%) the division included also the third option of 'Well Qualified'. 4 nominees (1.2%) were unanimously declared 'Not Qualified'.

Considering together the last three categories, 32 nominees, so nearly one tenth of the total (9.8%) was ranked, at least by some members of the board, as 'Not qualified'. On the opposite side, 'Well Qualified' was a ranking that was recognized, at least by some members of the board, in more than three fourth of the cases (77.1%). The general outcome is not negative but is far from being outstanding, at least if compared with the much higher score of President Biden.

The nominated judges that underwent evaluation so far during the current presidential term are 282.²⁷ A clear majority of them, approximately one third: 187 (66.3%), were unanimously ranked 'Well Qualified',²⁸ while for 57 (20.2%) the ranking was not unanimous between 'Well Qualified' and 'Qualified'. 31 (11.0%) were unanimously declared 'Qualified'. In 3 cases (1.1%) the board was divided between 'Qualified' and 'Not Qualified', and in 4 (1.4%) the three options 'Well Qualified', 'Qualified', and 'Not Qualified', were expressed. None of the nominees was unanimously declared 'Not Qualified'. As a result, only 7 judges nominated by President Biden (one out of forty: 2.5%) received 'Not Qualified' ranking by some members of the board; on the contrary, nearly nine tenth (87.9%) of the nominees were declared at least in part 'Well Qualified'.

These data confirm the idea that in choosing federal judges the Biden's administration paid a greater attention than the Trump's one on professional qualifications. This is a difference that cannot be underestimated, since it can be a symptom of a relevant change in the approach towards the reputation, the efficiency, and therefore the independence of the Federal Judiciary.

²⁴ Reports concerning nominations during each Congress since the 101st (1989-1990) are accessible at this webpage: https://www.americanbar.org/groups/committees/federal_judiciary/ratings/.

²⁵ Well Qualified was the rating that both Justice Neil M. Gorsuch and Brett M. Kavanaugh obtained.

²⁶ The third Associate Justice appointed by President Trump, Amy Coney Barrett, obtained this rating when she was nominated as Circuit Judge and, not surprisingly, when she was nominated as a member of the Supreme Court.

²⁷ These data and information are updated to September 24, 2024.

²⁸ Among them Justice Ketanji Brown Jackson, both for her nomination as Circuit Judge and as Associate Justice of the Supreme Court.

4.4 A Strong Commitment to Diversity

If the Federal Judiciary was traditionally characterized by a very high rate of white male judges, in the last years (especially since President Obama's tenure) diversity has become a major issue. Accordingly, President Biden committed to implement diversity and adopted an unprecedented approach in this regard, going even far beyond President Obama's results.

With reference to gender, at the beginning of President Biden's tenure, 73% of Article III Judges were male, thus the ratio between males and females was roughly three to one. This overwhelming majority had been only partially scratched during President Obama's years, when 41.95% of appointees were women; President Trump, on the contrary, strengthened the traditional predominance of men, by appointing women only in 23.93% of the cases.

President Biden completely overturned this policy, by appointing 134 women and 77 men, thus 65.31% of his appointees, namely nearly two-thirds, are women and only 36.49% are men. President Obama approached equality, while President Biden recognized the need for real positive discrimination.²⁹ The outcome has been a dramatic reduction of inequality in the Federal Judiciary, in which currently men are still a majority, but their ratio fell from 73% to 60.19%: in 2021, as I said, for every three men in the judiciary there was only a woman; currently, for three men the women are two.

As far as race and ethnicity are concerned, a very documented survey by the Federal Judicial Center tracked demography of Article III Federal Judges since 1789 up to 2020.³⁰ The most recent data of this survey confirmed that, for years ago, Whites still constituted a huge majority: 1154 judges out of 1432, thus 80.6%; in other words, the rate of Whites was four times that of all other races and ethnicities considered altogether. Such a high rate implied a significant overrepresentation, since according to the U.S. census of 2020, Whites were 61.6% of the population. The spread was so relevant, that all the minorities were, more or less, underrepresented, if one compared the number of judges with the share of the U.S. population that each minority expressed. Only 6.5% (93) and 9.5% (136) of judges belonged to the most relevant minorities, respectively Hispanic/Latinos and African Americans. That meant that African Americans judges were considerably below their rate of the U.S. population (12.4%), but the gap for Hispanic/Latinos was even much higher, since the share of federal judges was approximately one third of the share of the population (18.9%). Asian Americans, with 38 judges and a rate of 2.7% were also underrepresented, if one took into account their share of 6.0% of the U.S. population. The remaining 11 judges either were of two or more races or belonged to other minorities.

²⁹ These data are available at the website of the American Constitution Society, at the page concerning *Diversity of the Federal Bench. Current statistics on the gender and racial diversity of the Article III courts*, <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench>.

³⁰ See Federal Judicial Center, *Demography of Article III Judges, 1789-2020 – Race and Ethnicity*, <https://www.fjc.gov/history/exhibits/graphs-and-maps/race-and-ethnicity>.

These data caused concern with reference to diversity. It could not be otherwise, because they showed the inefficiency of previous policies aiming at implementing diversity. In particular, President Obama's policies considerably implemented diversity, but it was clear that their impact did not produce a turning point in this regard. In 2009-2017 years, the share of Whites appointees fell to 63.83%, a rate that was almost equal to the share of the White population in the United States. Minorities too were represented according to their share of population, apart from an overrepresentation of African Americans (17.9%), mainly at the expense of Latinos (9.7%). Asian Americans' rate (5.8%) was consistent with their share of the U.S. population.

President Obama's results were therefore quite positive; however, on the one hand, did not provide a new balance, since the shares of appointees were equivalent to the shares of the U.S. population, and, on the other hand, they did not establish a precedent. As a matter of fact, President Trump got back to a huge overrepresentation of Whites (84.2%), which resulted in a clear underrepresentation of all minorities, with the only exception of Asian Americans: their rate, 5.6%, was even substantially higher than the rate of African Americans and Hispanic/Latinos (3.8% for both).

Again, President Biden completely shifted the balance. For the first time, White appointees have been nothing more than the largest minority, with 38.50%. The dramatic fall of Whites' rate has allowed minorities to be almost all overrepresented. African Americans' rate has been 25.35%, which has been approximately twice their rate in the U.S. population; the same applies to Asian Americans, with a rate of 12.88%. The only two minorities that have not been overrepresented have been Hispanic/Latinos, who have covered 14.55% of the appointees, thus slightly underrepresented if compared with their share of the U.S. population, and Native Americans, who have been 1.41% of all the appointees, a rate which is roughly half their rate of the U.S. population (2.9%). Other races have been represented by 1.41% of appointees, while people of two or more races have covered 6.10% of the appointments.³¹

The effects of President Biden's action have been of the utmost relevance. The share of Whites in the Federal Judiciary is at present not too far from their share in the U.S. population: 546 judges are 65.86% of the whole Federal Judiciary and determine an overrepresentation of 4% (four years ago this overrepresentation was not far from 20%). The 120 African Americans, with 14.46%, and the 53 Asian Americans, with 6.39%, are fairly represented (and even a little overrepresented). On the contrary, Hispanic/Latinos and Native Americans are still underrepresented: the 78 Hispanic/Latinos are 9.48% (half of their rate of the U.S. population) and the 4 Native Americans are only 0.48% (namely one sixth of their rate of the U.S. population). 4 judges come from other minorities, while 24 judges (2.90%) represent two or more races.

³¹ For these data, see the above-mentioned webpage on *Diversity of the Federal Bench. Current statistics on the gender and racial diversity of the Article III courts*, <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench>.

It is obvious that something (maybe even much) still needs to be done, in particular for certain minorities, but it is beyond dispute that President Biden's policy has produced significant improvements in the way in which the Federal Judiciary can "look like America."

These data are so clear that they can suggest a possible conclusion for this brief overview. The commitment to diversity and the actions carried out accordingly were certainly in line with the targets that President Biden established since the beginning of his tenure. And this outcome will probably be the most relevant and enduring legacy of President Biden's policy concerning appointments.

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